

Cynthia L. Alexander, Esq.
Nevada Bar No. 6718
Andrew Sedlock, Esq.
Nevada Bar No. 9183
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252

Attorneys for Defendant Wells Fargo Bank, N.A.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EDWARD DEMARCO, an individual;
MARIJA LOURDES DEMARCO, an
individual;

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.;
NATIONAL DEFAULT SERVICING
CORPORATION; DOE Defendants I
through X, inclusive; and ROE
CORPORATIONS A through Z, inclusive,

Defendants.

CASE NO. 2:09-cv-02305-JCM-LRL

**DEFENDANT WELLS FARGO BANK,
N.A.'S REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

COMES NOW Defendant Wells Fargo Bank, N.A. ("Wells Fargo" or "Defendant"), by and through its counsel, the law firm of Snell & Wilmer L.L.P., and hereby files its Reply in support of Defendant's Motion to Dismiss Plaintiff's Complaint with prejudice pursuant to FRCP 12(b)(6).

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1 This Reply is based on the Memorandum of Points and Authorities herein, Plaintiffs'
 2 complaint on file with this Court (the "Complaint"), Plaintiffs' Opposition, and any oral argument
 3 that this Court may entertain.

4 Dated: January 15, 2010.

5 SNELL & WILMER L.L.P.

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 7 By: /s/ Andrew D. Sedlock
 8 Cynthia A. LeVasseur, Esq.
 9 Andrew D. Sedlock, Esq.
 3883 Howard Hughes Parkway
 Suite 1100
 Las Vegas, NV 89169

10 *Attorneys for Defendant Wells Fargo Bank, N.A.*

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. INTRODUCTION

13 The legal and factual deficiencies in Plaintiffs' Complaint are laid bare in Plaintiffs'
 14 Opposition to Wells Fargo's Motion to Dismiss. As this Court found during the December 18,
 15 2009 hearing on Plaintiffs' Emergency Motion for Preliminary Injunction, Plaintiffs are unlikely
 16 to succeed on the merits of their claims, and Wells Fargo's Motion to Dismiss removes any doubt
 17 regarding the viability of Plaintiffs' claims.

18 Plaintiffs' Opposition does little to rebut the arguments set forth in Wells Fargo's Motion,
 19 and instead opts to interject factual allegations that are entirely absent from the Complaint, and
 20 pleads with this Court to break with precedent and create new, and unfounded case law. As for
 21 the arguments that Plaintiffs actually address, none provide any support for their position that
 22 Wells Fargo acted in bad faith or is otherwise subject to any liability.

23 Plaintiffs' sole basis for their claims is that they were unable to secure a modification to
 24 the terms of their loan that suited their particular preference. However, the law does not support
 25 such relief, and none of the allegations in the Complaint, combined with the new allegations set
 26 forth in Plaintiffs' Opposition, raise Plaintiffs' right to relief above the speculative level as
 27 required to survive a motion to dismiss. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127
 28

1 S.Ct. 1955, 1964 (2007). Accordingly, Plaintiffs' Complaint should be dismissed in its entirety
 2 with prejudice against Defendants.

3 **II. LEGAL ARGUMENT**

4 **A. Wells Fargo Is Not Requesting That This Court Apply a "Heightened 5 Pleading Standard" to Plaintiffs' Complaint**

6 Plaintiffs are apparently quite dissatisfied with the current venue of this action, namely,
 7 the U.S. District Court for the District of Nevada, and refer to Wells Fargo's proper removal of
 8 this case as "not equitable, and border[ing] on unethical." Plaintiffs further argue that they are
 9 being held to an improper pleading standard, and believe that the rulings set forth in *Bell Atlantic*
 10 *Corp. v. Twombly*, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) create a
 11 "heightened pleading standard" that should not be applied to this case. Plaintiffs, however, set
 12 forth no case law or other persuasive authority that would cause this Court to apply a different
 13 standard, or find that the standards set forth in *Twombly* or *Iqbal* go beyond what is required by
 14 Fed. R. Civ. P. 8(a).

15 To the contrary, this Court has repeatedly held that neither *Twombly* nor *Iqbal* resulted in
 16 the application of a "heightened pleading standard" for complaints subject to a 12(b) motion to
 17 dismiss. *See Hays v. Clark County, Nevada, et al*, 2009 U.S. Dist. LEXIS 63772,*3 (D.Nev.
 18 2009) (expressly disagreeing that *Twombly* or *Iqbal* imposes a heightened pleading standard).
 19 This Court, in *Hays*, stated that the U.S. Supreme Court merely clarified that in order for a claim
 20 to be plausible, and therefore survive a motion to dismiss, it "must be more than merely possible
 21 or conceivable." *Id.* Allegations that are more likely explained by lawful behavior, or do not
 22 permit the court to infer more than the mere possibility of misconduct, is inadequate to show
 23 entitlement to relief. *Id.*

24 While Plaintiffs are clearly disappointed with the application of this standard, this Court is
 25 bound to follow the precedent set forth in *Twombly* and its progeny. Additionally, as previously
 26 recognized by this Court, *Twombly* does not establish a heightened pleading standard and simply
 27 elucidates the proper application of Rule 8(a). However, under any standard, Plaintiffs' claims
 28 fail as a matter of law, and should be dismissed in their entirety.

B. Wells Fargo Is Not Required To Show Standing To Conduct Foreclosure

In making the argument that Wells Fargo has failed to properly show standing to conduct the foreclosure sale of the subject property, Plaintiffs' fail to recognize that Wells Fargo is not the party that is ultimately responsible for exercising the rights of foreclosure in the deed of trust. While Plaintiffs' feign ignorance as to the true party in interest, they are more than aware that Wells Fargo transferred its beneficial interest in the deed of trust to Bank of America in August 2009. *See* Plaintiffs' Opposition, p. 8, lines 15-17. It is therefore puzzling why Plaintiffs would contend that Wells Fargo is exercising rights under a deed of trust it had previously assigned to another party, and begs the question as to why Plaintiffs have refused to add Bank of America as a party to this action.

Whatever Plaintiffs' reasons, the arguments regarding Wells Fargo's standing to conduct a foreclosure sale are misplaced. As set forth in Wells Fargo's Motion to Dismiss, and further explained during the December 18, 2009 hearing on Plaintiffs' Emergency Motion for Preliminary Injunction, Wells Fargo currently acts as the servicer for Plaintiffs' loan, and retained the servicing rights after it transferred its beneficial interest in the deed of trust to Bank of America. Nothing in the statute prevents agents, such as Wells Fargo, from acting on behalf of the beneficiary, Bank of America, nor would such an interpretation be appropriate. It is well settled law that where an agent is acting with authority, his actions bind the principal. See Dixon v. Thatcher, 103 Nev. 414, 417, 742 P.2d 1029 (1987), Meyer v. Virginia & Truckee R. R., 16 Nev. 341, 350 (1881).

Additionally, Plaintiffs continue to argue that, because NDSC was not the beneficiary, the successor in interest of the beneficiary or the trustee on June 8, 2009, the recording of the Notice of Default was improper. Again, as set forth in Wells Fargo's Motion to Dismiss, the Notice of Default indicates, on its face, that it is being recorded by NDSC as agent for Wells Fargo. It also states that NDSC is either the original Trustee, the duly appointed substituted Trustee or acting as agent for the Trustee or Beneficiary under the Deed of Trust. Wells Fargo was the beneficiary at the time of the Notice of Default, and thus, NDSC was acting as its agent.

NDSC was later substituted in as trustee by the current beneficiary, Bank of America, on

September 10, 2009, and is presently moving forward with the foreclosure action in that proper capacity. Simply put, the parties are properly and lawfully acting within their capacities as agents for the beneficiary of the deed of trust, and Plaintiffs have failed to raise any allegations that would cast any doubt upon the current foreclosure process. As such, Plaintiffs' related claims against Wells Fargo fail as a matter of law.

C. Defendants Complied With The Applicable Statutory Authority and Plaintiffs' Claims for Wrongful Foreclosure, Injunctive Relief, and Declaratory Relief Fail As a Matter of Law

Without actually addressing the case law and statutory references in Wells Fargo's Motion, Plaintiffs conclude, without supporting authority, that substantial compliance with NRS 107 is inadequate to establish a valid foreclosure sale. Plaintiffs then go on to allege that "Defendants have actually postponed, at this point, the sale of the home, via oral notice, more than three times." *See* Plaintiffs' Opposition, p. 10, lines 8-10.

In the Complaint, Plaintiffs allege that the foreclosure sale was postponed three times, and wrongfully argued that this requires a re-notice of the trustee's sale. *See* Complaint, ¶¶ 33-36. Wells Fargo set forth, in its Motion, that Plaintiffs' interpretation of the applicable statutory authority was incorrect, and that NRS 107.082 clearly states that a sales date, if it has been postponed three times, **cannot be further** orally postponed by the trustee without re-noticing the sale.

Now, Plaintiffs are alleging that there were more than three oral postponements, as in addition to the communications made to Plaintiffs' counsel, Plaintiffs themselves were notified orally that the sale had been postponed. Regardless of the insufficiency of these new allegations to establish a claim for statutory violation, Plaintiffs' attempt to include these new allegations at this point is entirely improper. Consideration of a motion to dismiss pursuant to Rule 12(b)(6) is limited to the contents of the complaint. *See Pinhas v. Summit Health, Ltd.* 894 F.2d 1024, 1028 (9th Cir. 1989). This limitation is particularly applicable to Plaintiffs, who cannot now allege

entirely new factual claims in an attempt to defeat dismissal¹. Plaintiffs are bound by their allegations in the Complaint, and those allegations are insufficient at this point to support any cause of action. Therefore, Plaintiffs' claims should be dismissed in their entirety.

D. Plaintiffs Fail To Establish Any Showing of Bad Faith

In response to the extensive line of case law cited by Wells Fargo dealing with the well-settled tender rule, Plaintiffs simply state that Wells Fargo is incorrect in relying on these cases. No supporting case law is cited, and Plaintiffs simply suggest that "[n]ew facts and times require new case law." However, this Court has all the legal and factual support it needs to dismiss Plaintiffs' claims, and the facts of this case are no different than the hundreds of cases currently clogging this Court's docket.

Plaintiffs rest their claims on the allegation that Wells Fargo enticed Plaintiffs into default with promises that Plaintiffs would receive a modified loan. Given the suspect nature of these claims, it is not surprising that Plaintiffs have no documentary evidence to support this allegation. The lack of documentation is fatal to Plaintiffs' claim, and Plaintiffs must allege more than mere verbal statements to rely upon or enforce these promises. Oral agreements to modify deeds of trust are subject to the statute of frauds, and courts have recognized that even a forbearance agreement is subject as well. *See Secrest v. Sec. Nat'l Mortg. Loan Trust*, Cal.Rptr.3d 275, 282-83 (Cal.Ct.App. 2008). In the absence of a writing, Plaintiffs cannot enforce this alleged promise or otherwise use it to override the established tender rule. Plaintiffs have failed to set forth any compelling argument to do away with this requirement, and as a result, Plaintiffs' claims are subject to dismissal in their entirety.

II. CONCLUSION

The arguments set forth in Plaintiffs' Opposition affirm the indication that Plaintiffs are attempting to use non-existent and inapplicable legal theories in an attempt to avoid the

¹ Plaintiffs also argue that the Notice of Default created "substantial confusion as to whom Plaintiffs should work with to cure their default." *See* Plaintiffs' Opposition at p. 10, lines 15-17. Plaintiffs' allegation is odd considering the multiple communications with Wells Fargo set forth in the Complaint, and the lack of any attempted communication with any other party. Plaintiffs do not allege that they attempted to contact Bank of America, the current beneficiary of the deed of trust, and Plaintiffs have failed to add Bank of America as a party to this action.

1 consequences of their default. Therefore, Wells Fargo respectfully requests that the Court dismiss
2 the Complaint against Wells Fargo with prejudice.

3 Dated: January 15, 2010.

4 SNELL & WILMER L.L.P.

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6 By: /s/ Andrew D. Sedlock
7 Cynthia A. LeVasseur, Esq.
8 Andrew D. Sedlock, Esq.
9 3883 Howard Hughes Parkway
10 Suite 1100
11 Las Vegas, NV 89169

12 *Attorneys for Defendant Wells Fargo Bank, N.A.*
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Snell & Wilmer
LLP

LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

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3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702)784-5200

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